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No. 84-326

In The

Supreme Court of the United States

October Term, 1984

JOHN T. CAIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Does Article VI, Section 3 of the New York State Constitution, which allows an appeal as of right to the State's highest court in a civil case directly involving a constitutional question, but requires a criminal defendant to obtain permission to appeal to that court, deprive appellant of his Fourteenth Amendment right to equal protection?

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MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

On March 12, 1982, appellant John T. Cain was convicted by a jury of making a punishable false written statement [New York Penal Law §210.45 (McKinney's Consolidated Laws of New York, Book 39, 1975)] and misconduct in relation to petitions [New York Election Law §17-122(7) (McKinney's, Book 17, 1978)]. The jury was unable to reach a verdict on a third charge, perjury in the first degree [New York Penal Law §210.15 (McKinney's,

Book 39, 1975)], and as to that charge a mistrial was declared. Cain's convictions stemmed from his misconduct in the 1980 Nassau County Republican primary, when he knowingly permitted registered voters to sign names other than their own on an election petition and then falsely certified that each signer had, in fact, separately appeared before him and personally signed his or her name.

Cain was sentenced on May 26, 1982. For each conviction he received a one-year conditional discharge; in addition, for the crime of making a punishable false written statement, Cain was fined $1,000 and ordered to do five-hundred hours of community service; for the crime of misconduct in relation to petitions, Cain was fined $500 and ordered to do two-hundred hours of community service; the hours of community service were to be done consecutive to each other. At the time of sentence, the perjury charge was dismissed by the court, on motion of the State (appellee) and with Cain's consent, with the proviso that if Cain's convictions on the other two charges were overturned on appeal, the perjury charge would be reinstated.

Cain then exercised his right to appeal [New York Crim. Proc. L. §§450.10(1), 450.60(2) (McKinney's, Book 11A, 1983)], and his appeal was heard by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.[1] On December 27, 1983, the state intermediate appellate court modified the judgment of conviction by reducing the community service condition on the Penal Law count to 200 hours and providing that the community service conditions be served concurrently. *People v. Cain,* 98 A.D. 2d 803 (2d Dept. 1983).

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1. In New York, an appeal from a judgment of conviction entered in the County Court of Nassau County may be taken as of right to this intermediate appellate court.

Cain then sought leave to appeal to the New York Court of Appeals, the state's highest court, pursuant to New York Crim. Proc. L. §§450.90(1), 460.20 which requires that such permission be granted. Appellant's criminal leave application was assigned to the Hon. Bernard S. Meyer, associate judge of the New York State Court of Appeals. On May 29, 1984, Judge Meyer denied the application.

In the proceedings before Judge Meyer, Cain sought leave to appeal on nearly all the issues he raised in the state intermediate appellate court. Several of the issues Cain sought to appeal to the state's highest tribunal involved federal constitutional claims. In addition, Cain "challenge[d] the constitutionality of Art. 6, Sec. 3 of the New York State Constitution insofar as it fails to extend the *right* of appeal to criminal cases while preserving such right in civil cases 'wherein is directly involved the construction of the constitution of the state or of the United States,' " on the ground that "[t]here appears to be utterly no rational basis or the furtherance of any legitimate state interest in this facial distinction between criminal and civil cases." Appellant's Appendix D, 8a. (Emphasis in the original.)

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution is reproduced in pertinent part in appellant's Jurisdictional Statement, p. 2.

Article VI, Section 3 of the New York State Constitution is annexed to Appellant's Appendix as Appendix E, pp. 9a-10a.

New York Criminal Procedure Law §450.90 and New York Criminal Procedure Law §460.20 are annexed hereto as Appendix A and Appendix B, respectively.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN APPELLANT'S JURISDICTIONAL STATEMENT

Cain challenges New York State's constitutional and statutory scheme, which permits civil litigants to appeal as of right to the New York Court of Appeals from a judgment or order of an intermediate state appellate court which finally determines an action or special proceeding, wherein the construction of the state or federal constitution is directly involved, while requiring criminal defendants to seek leave to appeal to that court, even when state or federal constitutional questions are involved, as violating the Fourteenth Amendment guarantee of equal protection.[2] His claim is frivolous; hence his appeal should be dismissed.

As often stated by this Court, there is no federal constitutional requirement that states provide any right whatsoever to appellate review of criminal convictions. *E.g., Estelle v. Dorrough,* 420 U.S. 534, 536-537 (1975); *Ross v. Moffitt,* 417 U.S. 600, 611 (1974); *Griffin v. Illinois,* 351 U.S. 12, 18 (1955); *McKane v. Durston,* 153 U.S. 684, 687 (1894). Nevertheless, once the state grants the right to appeal, it must meet the requirements of due process and equal protection. *Rinaldi v. Yeager,* 384 U.S. 305, 307 (1966); *Douglas v. California,* 372 U.S. 353 (1963); *Griffin v. Illinois,* 351 U.S. at 18. With regard to the requirement that there be equal protection, this Court in *Rinaldi* stated:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional

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2. Parenthetically, there is a direct appeal as of right to the Court of Appeals in criminal cases where a sentence of death is involved. New York Crim. Proc. L. §450.70.

> demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same". . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made."

384 U.S. at 308-309. (Citations omitted).

In the instant case, it is clear beyond doubt that there is a rational basis for treating civil and criminal litigants, who raise federal and state constitutional issues, differently on appeal. Obviously, in almost every criminal case the issues can readily be framed to present federal constitutional issues. Thus, the Legislature's decision to deny criminal defendants an automatic appeal to the highest state court in order to cut back on the potentially immense number of appellants is alone sufficient to pass the rational basis test.[3]

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3. The reasonableness of the legislature's decision is borne out by the statistics that appear in the 1981 and 1983 Annual Report of the Clerk of the Court to the Judges of the New York State Court of Appeal. The 1981 Annual Report, which includes statistics dating back to 1973, reveals that during that eight-year period (1973-1981) the 7-judge tribunal entertained over 11,390 criminal leave applications (CLA). The 1983 Annual Report indicates that for that calendar year 1954 criminal leave applications were received, of which 96 were granted.

On the other hand, the 1981 Annual Report demonstrates that the Court of Appeals from 1976-1981 heard a total of 126 appeals by civil litigants who appealed as a matter of right because the appeal contained a constitutional question. The 126 appeals represented less than 5% of the total number of civil appeals heard by the court during that period of time. The 1983 Annual Report indicates that 14 of the 555 civil appeals heard by the court in 1983 were appeals of right because they contained a constitutional question.

CONCLUSION

Appellant's appeal should be dismissed or affirmed.

Dated: New York, New York
October 18, 1984

Respectfully submitted,

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APPENDIX A — NEW YORK CRIMINAL PROCEDURE LAW §450.90. APPEAL TO COURT OF APPEALS FROM ORDER OF INTERMEDIATE APPELLATE COURT; IN WHAT CASES AUTHORIZED

1. Provided that a certificate granting leave to appeal is issued pursuant to section 460.20, an appeal may, except as provided in subdivision two, be taken to the court of appeals by either the defendant or the people from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court pursuant to section 450.10, 450.15, or 450.20. An order of an intermediate appellate court is adverse to the party who was the appellant in such court when it affirms the judgment, sentence or order appealed from, and is adverse to the party who was the respondent in such court when it reverses the judgment, sentence or order appealed from. An appellate Court order which modifies a judgment or order appealed from is partially adverse to each party.

2. An appeal to the court of appeals from an order of an intermediate appellate court reversing or modifying a judgment, sentence or order of a criminal court may be taken only if:

(a) The court of appeals determines that the intermediate appellate court's determination of reversal or modification was on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification; or

(b) The appeal is based upon a contention that corrective action, as that term is defined in section 470.10, taken or directed by the intermediate appellate court was illegal.

APPENDIX B — NEW YORK CRIMINAL PROCEDURE LAW §460.20. CERTIFICATE GRANTING LEAVE TO APPEAL TO COURT OF APPEALS

1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order of a judge granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.

2. Such certificate may be issued by the following judges in the indicated situations:

(a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) a judge of the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed.

(b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by a judge of the court of appeals.

3. An application for such a certificate must be made in the following manner:

(a) An application to a justice of the appellate division must be made upon reasonable notice to the respondent;

(b) An application seeking such a certificate from a judge of the court of appeals must be made to the chief judge of such court by submission thereof, either in writing or first orally and then in writing, to the clerk of the court of appeals. The chief judge must then designate a judge of such court to determine the application. The clerk must then notify the respondent of the application and must inform both parties of such designation.

Appendix B

4. A justice of the appellate division to whom such an application has been made, or a judge of the court of appeals designated to determine such an application, may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

5. Every judge or justice acting pursuant to this section shall file with the clerk of the court of appeals, immediately upon issuance, a copy of every certificate granting or denying leave to appeal.